Filed 12/30/09 P. v. Felix CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO ZEPEDA FELIX,

Defendant and Appellant.

F057698

(Super. Ct. No. PCF094121C)

**O P I N I O N**

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Tulare County. Elisabeth B. Krant, Judge.

Mark John Shusted, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*]Before Levy, Acting P.J., Gomes, J., and Poochigian, J.

On November 6, 1998, appellant, Alberto Zepeda Felix, drove a truck from which his brother fired several shots from a handgun at a vehicle with three occupants.

On June 8, 1999, Felix pled no contest to discharging a firearm at an occupied vehicle (Pen. Code, § 246).

On August 2, 1999, the court placed Felix on three years' probation on condition that he serve 240 days local time.

In November 2008, while serving a federal prison sentence, Felix was told by the Bureau of Prison officials that he could not participate in a residential drug abuse program because he had a prior conviction for "assault with a deadly weapon."

On February 9, 2009, Felix filed a petition for a writ of *coram nobis* in the trial court requesting the court to reverse his assault conviction because when he entered his plea to that offense Felix believed he pled only to aiding and abetting (Pen. Code, § 32) the assault and not to assault with a deadly weapon.

On March 13, 2009, the trial court denied Felix's petition.

Felix's appointed appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) However, in a document filed on October 1, 2009, Felix contends the court erred in denying his petition for a writ of *coram nobis*. Felix is wrong.

> "The seminal case setting forth the modern requirements for obtaining a writ of error *coram nobis* is *People v. Shipman* (1965) 62 Cal.2d 226 …. There we stated: 'The writ of [error] *coram nobis* is granted only when three requirements are met. (1) *Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment*." [Citations.] (2) Petitioner must also show that the "newly discovered evidence ... [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] This second requirement applies even though the evidence in

> question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ...."' [Citation.] These factors set forth in *Shipman* continue to outline the modern limits of the writ. [Citation.] [¶] … [¶] For a newly discovered fact to qualify as the basis for the writ of error *coram nobis*, we look to the fact itself and not its legal effect. 'It has often been held that the motion or writ is not available where a defendant voluntarily and with knowledge of the facts pleaded guilty or admitted alleged prior convictions because of ignorance or mistake as to the legal effect of those facts.' [Citation.]" (*People v. Kim* (2009) 45 Cal.4th 1078, 1092-1093, italics added.)

Felix contends he thought that in 1999 he pled to aiding and abetting an assault with a firearm, not to the assault itself. However, the transcript of the June 8, 1999, change of plea hearing indicates he actually pled to discharging a firearm at an occupied vehicle. Further, Penal Code, section § 31 provides: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, … are principals in any crime so committed." Thus, even though Felix only aided and abetted his brother in shooting at another vehicle, he was just as liable as his brother for committing this offense even though Felix did not actually discharge the firearm.

Moreover, at the beginning of the 1999 change of plea proceedings the prosecutor announced the basic terms of Felix's plea bargain as follows:

> "... As to the defendants, Alberto Felix and [his brother] the People were offering Count 1, a plea to 246 of the Penal Code and all other counts would be dismissed at the time of sentencing."

Later in the proceedings the following colloquy occurred:

> "THE COURT: All right, Mr. Alberto Felix and [Felix's brother], the allegation is that on or about the 6th day of November 1998 in this judicial district the crime of shooting an occupied motor vehicle in violation of [s]ection 246 of the Penal Code was committed by each of you,

*you did* [*willfully*], *unlawfully and maliciously fire a firearm at an occupied motor vehicle. Alberto Felix how do you plead to that charge*?

"DEFENDANT ALBERT[O] FELIX: No contest." (Italics added.) !(CT 8)!

Thus, the change of plea proceedings clearly shows that when Felix entered his plea in 1999, he was fully aware that he was pleading to discharging a firearm at an occupied vehicle. It also refutes Felix's claim that he thought he was pleading to being an accessory to assault with a firearm. Accordingly, we conclude that since Felix has not shown he entered his plea under a mistake of fact, the court did not abuse its discretion when it denied his petition for a writ of *coram nobis*.

Further, following independent review of the record we find that no reasonably arguable factual or legal issues exist.

The judgment is affirmed.